

STATE OF MICHIGAN  
IN THE CIRCUIT COURT FOR THE COUNTY OF INGHAM

DART CONTAINER OF MICHIGAN LLC,  
d/b/a DART DEVELOPMENT, a Michigan  
limited liability company, and ATLAS USA  
HOLDINGS LLC, a Delaware limited liability  
Company,

Plaintiffs,

No. 20-000333-CB-C30

v

**OPINION AND ORDER  
GRANTING MOTION FOR  
RECONSIDERATION**

STEVEN A. MILLS, an individual, MILLS  
REAL ESTATE CONSULTING, LLC, a  
Michigan limited liability company, JOHN  
ROBERT HUGHES, an individual, and  
J.R. HUGHES MANAGEMENT COMPANY,  
A Michigan corporation,

Defendants,

and

STEVEN A. MILLS, an individual,

Counter-Plaintiff,

v

DART CONTAINER OF MICHIGAN LLC, a  
Michigan limited liability company,

Counter-Defendant.

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At a session of said Court held in Lansing,  
Ingham County, Michigan, on June 25, 2021

PRESENT: Honorable Joyce Draganchuk  
Circuit Judge

Plaintiffs (“Dart”) filed a motion for partial summary disposition against Defendants as to Count VIII only. Count VIII was brought under MCL 750.125, known as the anti-kickback statute. Dart argued that there was no genuine issue of material fact and judgment should be granted in its favor. The Mills Defendants (“Mills”) opposed the motion and filed a cross-motion for summary disposition on grounds that there was no evidence of any agreement, which is required under the anti-kickback statute. The Hughes Defendants (“Hughes”) opposed Plaintiff’s motion, arguing that it was premature and that there were genuine issues of material fact. Hughes also focused on rehashing the Court’s previous ruling that there was a private cause of action under the anti-kickback statute.

After hearing oral argument and considering the responsive briefs, the Court ruled that there was insufficient evidence of the elements and denied Dart’s motion and granted Mills’ motion as to Count VIII. Dart has filed a motion for reconsideration and now argues that there is a genuine issue of material fact as to Count VIII.

Dart focuses much of the motion for reconsideration on the wrongfulness of Mill’s conduct. This is based on Plaintiff’s concern that the Court was saying that *Plaintiff* was trying to turn innocent conduct into wrongful conduct. The Court was actually attempting to stress that if the third element of the anti-kickback statute was not present, then application of *the statute* would turn innocent conduct into wrongful conduct. Again, the elements under the statute are as follows:

1. That the defendant was an agent or employee of plaintiff,
2. That the defendant requested or accepted a commission, gift, or gratuity,  
and

3. That when the defendant requested or accepted the commission, gift, or gratuity, it was according to an agreement or understanding between defendant and any other person that defendant shall act in a particular manner in relation to plaintiff's business

Thus, the mere payment of a finder's fee, something that would in many situations be legitimate conduct, is not by itself prohibited by the statute. Rather, the payment of a finder's fee or similar payment under an agreement or understanding with a third party to act in a particular way with regard to the employer's business is the element that turns what could otherwise be innocent conduct into prohibited conduct. Dart's policy manual or Newmark's opinion that Defendants acted wrongfully may be true as to them, but it does not satisfy the statute.

All of the above being said, the Court is willing to re-examine the ruling on Plaintiff's motion for partial summary disposition. Rather than attempting to explain or justify how the Court got to an incorrect result, suffice it to say that it did.

First, was there an agreement? While Defendants point to no evidence of an actual agreement, facts can always be shown by circumstantial evidence. Furthermore, there is no indication in the statute that an agreement must be expressly made. In fact, the statute specifically uses the words "agreement or *understanding*." An understanding is a mental state. Therefore, the statute specifically allows for an agreement that may not be expressly made. There is circumstantial and direct evidence of at least an understanding between Mills and Hughes.

Second, did the agreement or understanding relate to acting in a particular manner in relation to Dart's business? At the very least, this could mean simply that Mills would continue to send Dart's business to Hughes. The Court recognizes factual disputes exist about this aspect of the case:

- Was Mills a decision-maker or someone who had control over Dart's business with Hughes?
- Did Hughes believe *at the time the payments were made* that Dart knew of the payments and agreed with them?
- Did Hughes have an intent to influence Mills in relation to Dart's business?
- To what extent was Mills the source of Dart business directed to Hughes?

Dart argues for the first time in its motion for reconsideration that there are genuine issues of material fact. Hughes has maintained that from the beginning. The Court agrees. Given that an agreement can also be an understanding and that intent is at issue, these issues must be decided by a jury. The Court cannot supplant the finder of fact.

For these reasons, the Dart's motion for reconsideration is granted and Dart's motion for partial summary disposition as to Count VIII is denied. Mill's cross-motion for summary disposition as to Count VIII is also denied. Count VIII is reinstated (as to the officer period) against all Defendants.

/S/

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Joyce Draganchuk (P39417)  
Circuit Judge

### **PROOF OF SERVICE**

I hereby certify that I served a copy of the above opinion and order granting motion for reconsideration upon the attorneys of record by placing said document in sealed envelopes addressed to each and depositing same for mailing with the United States Mail at Lansing, Michigan, on June 25, 2021.

/S/

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Michael Lewycky  
Law Clerk/Court Officer